

Senate Engrossed House Bill

FILED

**KEN BENNETT
SECRETARY OF STATE**

State of Arizona
House of Representatives
Forty-ninth Legislature
Second Regular Session
2010

CHAPTER 177

HOUSE BILL 2166

AN ACT

AMENDING SECTION 38-1101, ARIZONA REVISED STATUTES; RELATING TO LAW
ENFORCEMENT AND PROBATION OFFICERS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 38-1101, Arizona Revised Statutes, is amended to
3 read:

4 38-1101. Law enforcement officers; probation officers; right to
5 representation; right to evidence on appeal; change
6 of hearing officer or administrative law judge;
7 burden of proof; definitions

8 A. If an employer interviews a law enforcement officer or probation
9 officer and the employer reasonably believes that the interview could result
10 in dismissal, demotion or suspension:

11 1. The law enforcement officer or probation officer may request to
12 have a representative of the officer present at no cost to the employer
13 during the interview. The law enforcement officer or probation officer shall
14 select a representative who is available on reasonable notice so that the
15 interview is not unreasonably delayed. The representative shall participate
16 in the interview only as an observer. Unless agreed to by the employer, the
17 representative shall be from the same agency and shall not be an attorney.
18 The law enforcement officer or probation officer shall be permitted
19 reasonable breaks of limited duration during any interview for telephonic or
20 in person consultation with others, including an attorney, who are
21 immediately available. An employer shall not discipline, retaliate against
22 or threaten to retaliate against a law enforcement officer or probation
23 officer for requesting that a representative be present or for acting as the
24 representative of a law enforcement officer or probation officer pursuant to
25 this paragraph.

26 2. Before the commencement of any interview described in this section,
27 the employer shall provide the law enforcement officer or probation officer
28 with a written notice informing the officer of the specific nature of the
29 investigation, the officer's status in the investigation, all known
30 allegations of misconduct that are the reason for the interview and the
31 officer's right to have a representative present at the interview.

32 3. The employer may require the law enforcement officer or probation
33 officer to submit to a polygraph examination if the officer makes a statement
34 to the employer during the investigation that differs from other information
35 relating to the investigation that is known to the employer and reconciling
36 that difference is necessary to complete the investigation. If a polygraph
37 examination is administered pursuant to this paragraph, the employer or the
38 person administering the polygraph examination shall make an audio recording
39 of the complete polygraph procedure and provide a copy of the recording to
40 the law enforcement officer or probation officer.

41 4. The law enforcement officer or probation officer, at the conclusion
42 of the interview, is entitled to a period of time to consult with the
43 officer's representative and may make a statement not to exceed five minutes
44 addressing specific facts or policies that are related to the interview.

- 1 B. Subsection A does not require the employer to either:
- 2 1. Stop an interview to issue another notice for allegations based on
- 3 information provided by the law enforcement officer or probation officer
- 4 during the interview.
- 5 2. Disclose any fact to the law enforcement officer or probation
- 6 officer or the law enforcement officer's or probation officer's
- 7 representative that would impede the investigation.
- 8 C. Subsection A, paragraphs 1 and 2 do not apply to an interview of a
- 9 law enforcement officer or probation officer that is:
- 10 1. In the normal course of duty, counseling or instruction or an
- 11 informal verbal admonishment by, or other routine or unplanned contact with,
- 12 a supervisor or any other law enforcement officer or probation officer.
- 13 2. Preliminary questioning to determine the scope of the allegations
- 14 or if an investigation is necessary.
- 15 3. Conducted in the course of a criminal investigation.
- 16 4. Conducted in the course of a polygraph examination.
- 17 D. In any appeal of a disciplinary action by a law enforcement officer
- 18 or probation officer, the parties shall exchange copies of all relevant
- 19 documents and a list of all witnesses pursuant to the following time periods
- 20 and requirements:
- 21 1. Within three business days after the employer's receipt of a
- 22 written request from the law enforcement officer or probation officer for a
- 23 copy of the investigative file that is accompanied by a copy of the filed
- 24 notice of appeal, the employer shall provide a complete copy of the
- 25 investigative file as well as the names and home or work mailing addresses of
- 26 all persons interviewed during the course of the investigation.
- 27 2. No later than five business days before the appeal hearing, or, if
- 28 the appeal hearing is scheduled more than twenty days after the notice of
- 29 appeal, no later than ten business days before the appeal hearing, the
- 30 employer and the law enforcement officer or probation officer shall exchange
- 31 copies of any documents that may be introduced at the hearing and that have
- 32 not previously been disclosed.
- 33 3. No later than five business days before the appeal hearing, or, if
- 34 the appeal hearing is scheduled more than twenty days after the notice of
- 35 appeal, no later than ten business days before the appeal hearing, the
- 36 employer and the law enforcement officer or probation officer shall exchange
- 37 the names of all witnesses who may be called to testify. A witness may be
- 38 interviewed at the discretion of the witness. The parties shall not
- 39 interfere with any decision of a witness regarding whether to be interviewed.
- 40 An employer shall not discipline, retaliate against or threaten to retaliate
- 41 against any witness for agreeing to be interviewed or for testifying or
- 42 providing evidence in the appeal.
- 43 E. It is unlawful for a person to disseminate information that is
- 44 disclosed pursuant to subsection D to any person other than the parties to
- 45 the appeal and their lawful representatives for purposes of the appeal of the

1 disciplinary action. This subsection does not prohibit the use of the
2 information in the hearing or disclosure pursuant to title 39, chapter 1,
3 article 2.

4 F. The employer or the law enforcement officer or probation officer
5 may seek a determination by the hearing officer, administrative law judge or
6 appeals board hearing the appeal regarding any evidence that the employer or
7 the law enforcement officer or probation officer believes should not be
8 disclosed pursuant to subsection D because the risk of harm involved in
9 disclosure outweighs any usefulness of the disclosure in the hearing. In
10 determining whether evidence will be disclosed, the hearing officer,
11 administrative law judge or appeals board may perform an in camera review of
12 the evidence and may disclose the material subject to any restriction on the
13 disclosure, including the closing of the hearing or the sealing of the
14 records, that the hearing officer, administrative law judge or appeals board
15 finds necessary under the circumstances.

16 G. In any appeal of a disciplinary action by a law enforcement officer
17 or probation officer in which a single hearing officer or administrative law
18 judge has been appointed to conduct the appeal hearing, the law enforcement
19 officer or probation officer or the employer may request a change of hearing
20 officer or administrative law judge. In cases before the office of
21 administrative hearings or if the employer is a county with a population of
22 two hundred fifty thousand or more persons or a city with a population of
23 sixty-five thousand or more persons, on the first request of a party, the
24 request shall be granted. All other requests, including any subsequent
25 requests in cases before the office of administrative hearings or if the
26 employer is a county with a population of two hundred fifty thousand or more
27 persons or a city with a population of sixty-five thousand or more persons,
28 may be granted only on a showing that a fair and impartial hearing cannot be
29 obtained due to the prejudice of the assigned hearing officer or
30 administrative law judge. The supervisor or supervising body of the hearing
31 officer or administrative law judge shall decide whether a showing of
32 prejudice has been made.

33 H. A party who violates subsection A, PARAGRAPH 1, OR SUBSECTION D or
34 E, unless the violation is harmless, shall not be permitted to use that
35 evidence at the hearing, except on a showing of good cause. The hearing
36 officer or administrative law judge, on a showing of good cause, may grant
37 the opposing party a continuance, otherwise limit the use of the evidence or
38 make such other order as may be appropriate.

39 I. The burden of proof in an appeal of a disciplinary action by a law
40 enforcement officer or probation officer shall be on the employer.

41 J. Except where a statute or ordinance makes the administrative
42 evidentiary hearing the final administrative determination, an employer or a
43 person acting on behalf of an employer may amend, modify, reject or reverse a
44 decision made by a hearing officer, administrative law judge or appeals board
45 after a hearing where the law enforcement officer or probation officer and

1 the employer have been equally allowed to call and examine witnesses,
2 cross-examine witnesses, provide documentary evidence and otherwise fully
3 participate in the hearing if the decision was arbitrary or without
4 reasonable justification and the employer or person acting on behalf of the
5 employer states the reason for the amendment, modification, rejection or
6 reversal.

7 K. An employer shall not include in that portion of the personnel file
8 of a law enforcement officer or probation officer that is available for
9 public inspection and copying any information about an investigation until
10 the investigation is complete or the employer has discontinued the
11 investigation. If the law enforcement officer or probation officer has
12 timely appealed a disciplinary action, the investigation is not complete
13 until the conclusion of the appeal process.

14 L. This section does not preempt agreements that supplant, revise or
15 otherwise alter the provisions of this section, including preexisting
16 agreements between the employer and the law enforcement officer or probation
17 officer or the law enforcement officer's or probation officer's lawful
18 representative association.

19 M. For the purposes of this section:

20 1. "Appeal" means a hearing before a state or local merit board, a
21 civil service board, an administrative law judge or a hearing officer.

22 2. "Disciplinary action" means the dismissal, demotion or suspension
23 for more than twenty-four hours of a law enforcement officer or probation
24 officer that is authorized by statute, charter or ordinance and that is
25 subject to a hearing or other procedure by a local merit board, a civil
26 service board, an administrative law judge or a hearing officer.

27 3. "Investigative file" means the law enforcement agency's complete
28 report and any attachments detailing the incidents leading to the
29 disciplinary action.

30 4. "Law enforcement officer" means:

31 (a) An individual, other than a probationary employee, who is
32 certified by the Arizona peace officer standards and training board, other
33 than a person employed by a multi-county water conservation district.

34 (b) A detention officer or correction officer, other than a
35 probationary employee, who is employed by this state or a political
36 subdivision of this state.

37 5. "Probation officer" means a probation officer or surveillance
38 officer, other than a probationary employee, who is employed by this state or
39 a political subdivision of this state.

APPROVED BY THE GOVERNOR APRIL 27, 2010.

FILED IN THE OFFICE OF THE SECRETARY OF STATE APRIL 28, 2010.